44TH ITEM of Level 1 printed in FULL format.

Kentucky Law Journal

1988

76 Ky. L.J. 707

LENGTH: 14413 words

SYMPOSIUM ON JUDICIAL DISCIPLINE AND IMPEACHMENT: An Essay on the Constitutional Parameters of Federal Impeachment*

* Adapted from a speech given at the Symposium on Judicial Discipline and Impeachment, sponsored by the Kentucky Law Journal.

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-** Professor of Law, University of Illinois. B.A., Harvard University, 1967; J.D., Harvard University, 1970. I would like to give special thanks to Richard Underwood, who read an earlier draft of this piece and made several helpful suggestions.

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SUMMARY:

... The time is particularly appropriate for discussing the federal law of impeachment because impeachment is not currently a part of our daily news diet. ... To encourage the delegates to speak in complete candor and not play to the press, they also decided there would be no calling of the yeas and nays by delegate name. ... The Constitution offers a brief definition of what constitutes an impeachable offense when it provides that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." ... In addition, because the sanction for impeachment is limited to removal and to disqualification, the use of impeachment does not preclude later criminal trial and punishment. ... George Mason, one of the delegates to the Constitutional Convention, objected to limiting impeachment to treason and bribery, because he though it essential to reach "[a]ttempts to subvert the Constitution." ... Moreover, the potential for national confusion would be great if the Senate were to declare the presidential office vacant and the impeached President refused to leave, applied for Supreme Court or lower court review, and raided various alleged errors -- for example, that some of the Senators who voted against him were prejudiced and should have disqualified themselves, or that the definition of impeachment was improper. ...

TEXT:

[*707] INTRODUCTION

The time is particularly appropriate for discussing the federal law of impeachment because impeachment is not currently a part of our daily news diet. n1 We can thus discuss this issue calmly, without the pressures, either conscious or subconscious, of result-oriented thinking.

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n1 In October 1986, Federal District Judge Harry Clairborne of Nevada became the first judge in approximately a half century to be impeached by the House and removed by the Senate after he was convicted in Federal court of income tax evasion. T. MORGAN & R. ROTUNDA, PROFESSIONAL RESPONSIBILITY 515 (4th ed. 1987). Judge Miles Lord resigned after various charges were made against him concerning allegedly intemperate statements that he made in open court. See *Gardiner v. A.H. Robbins Co., Inc., 747 F.2d 1180 (8th Cir. 1984)*.

Investigation of bribery allegations concerning Judge Alcee L. Hastings of Florida continued after his acquittal in a criminal trial. See *Matter of Certain Complaints Under Investigation, 783 F.2d 1488 (11th Cir. 1986)*. A special judicial panel reported "clear and convincing evidence" that Judge Hastings conspired to solicit a $ 150,000 bribe and "attempted to corruptly use his office for personal gain." It then recommended impeachment by Congress. N.Y. Times, Oct. 8, 1987, at 14, col. 1-4. Unlike Judge Clairborne, Judge Hastings was acquitted of bribery charges in his criminal trial. However, William Borders, Jr. was convicted at a separate trial of conspiring to arrange sending the bribe to Hastings. The special judicial panel also accused Hastings of giving false testimony and presenting fabricated evidence at his criminal trial.

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I propose to examine some of the legal issues relating to impeachment in an effort to outline what the constitutional definition should be. Much has already been written on this [*708] subject, n2 and I have no intention of reploughing those fields which have already been well furrowed. Much of our recent literature on impeachment has been produced in large part because President Nixon's Watergate troubles of a decade and a half ago. n3 President Nixon has, unwittingly, forced us to think about such issues.

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n2 See generally Lawrence, A Brief of the Authorities upon the Law of Impeachable Crimes and Misdemeanors, CONG. GLOBE SUPPLEMENT, 40TH Cong., 2d Sess. 41 (1868); R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973); I. BRANT, IMPEACHMENT: TRIALS & ERRORS (1972); P. HOFFER & N. HALL, IMPEACHMENT IN AMERICA: 1635-1805 (1984); J. LABOVITZ, PRESIDENTIAL IMPEACHMENT (1978); Dwight, Trial by Impeachment, 6, AM. L. REV. (n.s.) 257 (1867); Ethridge, The Law of

Impeachment, *8 MISS. L.J. 283 (1936)*; Feerick, Impeaching Federal Judges: A study of the Constitutional Provisions, *39 FORDHAM L. REV.* 1 (1970-71); Fenton, The Scope of the Impeachment Power, *65 NW. U.L. REV. 719* (1970-71); Simpson, Federal Impeachments, *64 U. PA. L. REV. 651 (1916)* (pt. I); Simpson, Federal Impeachments, *64 U. PA. L. REV. 803 (1916)* (pt. II); Walthall, Executive Impeachment: Stealing Fire from the Gods, *9 NEW ENG. L. REV. 257, 291 (1974)*; Yankwich, Impeachment of Civil Officers Under the Federal Constitution, *26 GEO. L. J. 849* (1937-38); Note, The Exclusiveness of the Impeachment Power Under the Constitution, *51 HARV. L. REV. 330 (1937)*; Note, Vagueness in the Constitution: The Impeachment Power, *25 STAN. L. REV. 908 (1973)*.

n3 See, e.g., REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY, CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, 93d Cong., 2d Sess. (1974); see also 1 R. R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 7.1-7.3 (1986).

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I. IMPEACHMENT AND THE ROLE OF HISTORY

One cannot talk about impeachment in this country without reference to our constitutional history. That history is obviously relevant, yet it is important to keep it in perspective. I do not share the views of those who argue either that we must be slaves to history, n4 or that the views of the framers "are neither relevant nor morally binding." n5

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n4 Professor Raoul Berger, for example, may place too much reliance on history. See R. Berger, supra note 2. In addition, the history is too often not clear as he indicates.

As discussed below, the framers explicitly rejected various British impeachment practices. See, e.g., J. KALLENBACH, THE AMERICAN CHIEF EXECUTIVE 51 (1966).

n5 C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 103 (1978). Professor L. Tribe has been quoted as arguing that James Madison never suggested that the framers intended posterity to rely on original intent as the oracular guide in explaining the Constitution. (SEE SOURCE FOR ORIGINAL TEXT) Mr. Meese, Meet Mr. Madison, ATLANTIC MONTHLY, Dec. 1986, at 77, 79.

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[*709] I believe a middle ground exists between rejecting any role for history and unthinking reliance on history. It may be helpful and useful to refer to original intent, even if a strict view of history may not be

controlling, when it is read in context. We need not pretend that all judges and commentators who look at history -- as well as the other tools of judicial review such as text, structure, logic, and precedent -- will reach the same conclusions regarding the law of impeachment, but at least they will start at the same base line.

The issues relating to original intent and to the uses of history have created almost a cottage industry in scholarly literature. n6 In this short Essay, I cannot hope to canvas all of the arguments, but I hope to set them in proper perspective by briefly looking at the Constitutional Convention of 1787 and the contrast the framers drew between public intent and private intent.

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n6 See 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, supra note 3, at §§ 23.2-23.5 (1986).

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Soon after the delegates to the Constitutional Convention began their deliberations in that hot summer in Philadelphia in 1787, they turned to the question of secrecy. Though there was little agreement on many issues, they quickly agreed to conduct all deliberations in secret. n7 To encourage the delegates to speak in complete candor and not play to the press, they also decided there would be no calling of the yeas and nays by delegate name. n8 Votes would only be recorded by states. To make new eaks more difficult, members could inspect the journal of the proceedings but would not be permitted to make any copy of any of its entries. The delegates also ordered that "nothing spoken in the House be printed, or otherwise published or communicated without leave." n9 And, to prevent any unauthorized entry, the Convention placed sentries both inside and outside the meeting place. A contemporary observer reported that these sentries "appear to be very alert in the performance of their duty." n10

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n7 5 J. ELLIOTT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION HELD AT PHILADELPHIA IN 1787, at 127 (1845 reprinted 1937).

n8 Id. at 123. Madison's unofficial notes sometimes record the names of individuals who were for or against certain questions.

n9 M. FARRAND, THE FRAMING OF THE CONSTITUTION 58 (1913).

n10 Id.

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[*710] The importance the delegates attached to the secrecy of their private deliberations is symbolized by an episode involving George Washington. Washington, we must remember, was at the zenith of his popularity. Professor Max Farrand tells us that the "feeling towards him was one of devotion, almost awe and reverence. His presence in the convention was felt to be essential to the success of its work. . . ." n11 During the course of the Convention, one of the delegates accidentally dropped a copy of some proposals. Another delegate, discovering the los papers, turned them over to Washington, who scolded the unknown delegate for losing the papers: "I must entreat gentlemen to be more careful, lest our transactions get into the newspapers, and disturb the public repose by premature publications." n12 Washington then threw the papers on the table, demanded that the owner pick them up, and left the room. The delegates reacted like scared children: no one come forward. No one was willing to accept the responsibility for this possible breach of secrecy.

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n11 Id. at 15.

n12 C. WARREN, THE MAKING OF THE CONSTITUTION 139 (1928).

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Not until many years after the Constitution had been ratified did Congress order that those proceedings and fragmentary minutes which were in the hands of the Government, be printed. n13 The people who publicly debated and ratified the new Constitution had no access to the Convention notes. In face, when President Washington, in his message to Congress of March 30, 1796, referred to the unpublished Journal of the Constitutional Convention in support of a particular interpretation of the Constitution, various members of Congress thought that his reference had violated the Convention's rule of secrecy. n14 Much of [*711] what we now know comes from one person, Madison, who took it upon himself to compile a more complete and unofficial record. But Madison's notes were not published until 1840. n15 It is common, at the present time, to comb with fine care the various notes taken during that Convention as if they were a magical pinata which, if hit at the right angle, will unlock the Constitution's secrets. But the Generation of 1787 did not have access to any of these notes or minutes. Writings which did not see the light of day until over a half century after the Convention was held could not have influenced the ratifiers, because they were hidden from them.

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n13 The Resolve of Congress of March 27, 1818, ordered printed those papers in the possession of John Quincy Adams that related to the Constitutional Convention. These papers included the minutes of the Journal of the Convention.

Making of the Constitution, id. at 707. The year 1821 saw the publication of the notes of Robert Yates, a member of the Convention. Yates, however, left the Convention on July 10, 1787, over two months before the Convention adjourned. Id. at 721, 798. Madison's Notes were not published until 1840. Warren notes: "It is a singular fact that it was not until fifty-three years after the Constitution was signed that the American people were afforded any adequate knowledge of the debates of the Federal Convention." Id. at 802.

n14 See 5 ANNALS OF CONG. 775-76 (1796) (remarks of Representative James Madison); id. at 734 (remarks of Representative Albert Gallatin). Madison also wrote to Jefferson explaining that Washington's use of the Convention's Journal violated the Convention's rule of secrecy. Letter from James Madison to Thomas Jefferson (Apr. 4, (1796), quoted in *C. WARREN, supra* note 12, at 796.

n15 *C. WARREN, supra* note 12, at 802.

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That is not to say that the Convention notes are necessarily irrelevant as an aid in interpreting the written document. The secret Convention notes may help tell us what certain words may mean, how much language may be stretched, or how much it may be restricted. n16 But the ratifiers of the new Constitution should not be held to have approved of the hidden Convention notes any more than your incorporation of my language necessarily incorporates my hidden intent. n17 As a logical matter, a person cannot be held to have adopted someone else's hidden, secret thoughts. n18 As Representative Albert Gallatin noted during the congressional debates on Jay Treaty, it is wrong to rely on "the opinions and constructions of those persons who had framed and proposed the Constitution, opinions given in private constructions unknown to the people when they adopted the instrument." n19

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n16 Thus Luther Martin, one of the delegates to the Constitutional Convention, offered, as an aid to interpretation, his eyewitness account of the Convention's view on intergovernmental immunity during oral argument. See *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372 (1819)*.

n17 Cf. *United States v. Public Utils. Comm'n, 345 U.S. 295, 319 (1953)* (Jackson, J., concurring).

n18 While I have based my argument upon logic and the common meaning of language, Professor Powell's elaborate historical research also supports this conclusion. See Powell, The Original Understanding of Original Intent, *98 HARV. L. REV. 885 (1985)*; cf. R. ROTUNDA, THE POLITICS OF LANGUAGE (1986).

n19 5 ANNALS OF CONGRESS 734 (1796) (emphasis added).

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[*712] Some contemporary commentators go well beyond this logical point when they maintain that the framers did not intend the judiciary to look at evidence of public intent, such as The Federalist Papers, the historical circumstances, and the state ratifying conventions. n20 The historical evidence hardly compels this conclusion. While Madison, for example, opposed looking at secret, subjective intent, expressed in the halls of the Philadelphia Convention, he also urged us to look "for the meaning of that instrument . . . not in the General Convention which proposed, but in the State Conventions which accepted and ratified it." n21

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n20 Parts of Professor Powell's study may be interpreted as presenting this argument. See Powell, supra note 18, at 919 (noting that various Congressmen opposed looking at "extraneous sources" such as the state ratifying conventions). Professor Powell argues that, in *Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793)*, it was proper for the Court to ignore "the virtually unanimous response" of the federalists as expressed in The Federalist No. 81 and instead to look just at the text and to interpret it without reference to such historical background. Id. at 922-23. Chisholm, one should recall, was hardly a model of proper interpretation. It was soon overturned by the eleventh amendment.

Some commentators, in opposing any look to history, argue that *Brown v. Board of Education, 347 U.S. 483 (1954)*, was not true to historical intent because many members of the congress who opposed the fourteenth amendment also supported school segregation. Thus, they argue, if you look to history, you must reject Brown. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 2, 68 (1982). However, we must look at the intent of the public and of the ratifiers, not merely the opinion of certain members of Congress. While the intent of the ratifiers and of the framers may not be entirely clear, it is true that after the Civil War, many people did intent to eliminate all vestiges of slavery. The fact that Congress enacted the broad protection of the Civil Rights Act of 1875 is proof of that intent. The Supreme Court invalidated this law in the *Civil Rights Cases, 109 U.S. 3 (1883)*. Looking at the wording of the fourteenth amendment is also relevant; the amendment promises "equal protection," not "separate but equal protection." U.S. CONST. amend. XIV § 1.

n21 *C. WARREN, supra* note 12, at 794; see Letter from James Madison to S.H. Smith (Feb. 21, 1827), Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), Letter from James Madison to M.L. Hurlbert (May 1830), cited in id. at 800-01 n.1.

Three states did not report their state constitutional conventions. In three instances the state conventions were thoroughly reported; in the remainder of the states, they were reported "badly or very incompletely." 1 J. GOEBEL, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 324 (1971). On the state conventions, see generally id. at 324-412.

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Rather than talking about the framers' intent, one should be more precise and refer to the ratifiers' intent, what Hamilton in The Federalist Papers called "the intention of the people." n22 [*713] Thus, the early case law and early constitutional authorities recognized that publicly available authorities, such as The Federalist Papers, offered a contemporary and very relevant explication of the meaning of the new Constitution. n23 Turning to The Federalist Papers was one of Justice Story's "Rules of Interpretation." n24

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n22 THE FEDERALIST No. 78 (A. HAMILTON), reprinted in R. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 10 (2d ed. 1985).

n23 E.g., *Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 418 (1821); McCulloch, 17 U.S. (4 Wheat.) at 372, 433* (Luther Martin's argument to the Court included reading extracts from The Federalist Papers and the Virginia and New York Conventions.); see 3 R. ROTUNDA, J. NOWAK, & J. YOUNG, supra note 3, at § 23.35.

n24 See JOSEPH STORY'S COMMENTARIES ON THE CONSTITUTION 134, 148 (R. Rotunda & J. Nowak eds. 1987) [hereinafter J. STORY].

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History, of course, must be read in context. n25 Sometimes it may tell us that a particular clause was calculated to be ambiguous, perhaps to paper over differences, perhaps to provide for flexibility, or perhaps to allow for evolutionary growth in the law. And reasonable people will, at times, interpret the evidence differently. But these obvious facts certainly do not mean that the intent of the ratifiers is irrelevant, even if that intent is sometimes difficult to discover. Although Pharaoh's dreams were not easy to interpret, Joseph did not therefore advise Pharaoh to ignore them.

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n25 Sometimes the authors of The Federalist Papers "exaggerated [the Constitution's] advantages, and spread over the objectionable features the gloss of plausible construction." *State v. McBride, 24 S.C.L. (Rice) 400 (S.C. 1839).*

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Some who attack the use of original intent argue that to require a modern day

judge to apply a constitutional provision only to the precise situations envisioned two hundred years ago is wrong. And so it is; the argument is a strawman. We "cannot know how the framers would vote on specific cases today, in a very different world than the one they knew." n26 The Constitution, as Marshall said, was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs . . . [and to] exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." n27 A belief in the relevance of history hardly requires any doctrinaire, unsophisticated, mechanical application of the views of the past. The framers and the ratifiers of the [*714] Constitution intended a flexible document, designed to endure for ages. n28

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n26 E.g., Bork, in The Great Debate: Interpreting Our Written Constitution 46 (1986).

n27 *McCulloch, 17 U.S. (4 Wheat.) at 415.*

n28 Thomas Jefferson seriously proposed that the new Constitution should automatically expire by 1823 at the latest, because each new generation, he thought, should have to come to terms with its own constitution. Jefferson selected that number because 34 years was the average remaining life expectancy of people who had reached the age of majority (21 years) in 1789, the year the new government began. The generation of 1787 rejected this sunset proposal. Van Alstyne, Notes on a Bicentennial Constitution: Part I, Processes of Change, *1984 U. ILL. L. REV. 933, 937*. The Constitution should have a longer life than that. As John Marshall later concluded: "We must never forget that it is a constitution we are expounding." *McCulloch, 17 U.S. (4 Wheat.) at 407*. Marshall, by the way, believed that this conclusion was what the framers had "entertained." Id. Our Constitution should not be interpreted with the strictness of a municipal code, because that interpretation would be contrary to the original intent.

The private debates also support this conclusion. At one point Madison and Sherman proposed a particular change to allow more flexibility and to take into account future growth in the new country. One delegate objected: "It is not to be supposed that the government will last so long as to produce this effect. Can it be supposed that this vast country, including the western territory, will, one hundred and fifty years hence, remain one nation?" The delegates apparently thought so; they opted for Madison's change. 5 J. ELLIOTT, supra note 7, at 392.

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Historical evidence does have a role to play in exploring the parameters of federal impeachment. Let us now consider the impeachment power and its historical context.

II. THE LANGUAGE OF IMPEACHMENT IN THE CONSTITUTION

Our pithy Constitution makes several references to impeachment. We are told that the House of Representatives "shall have the sole Power of Impeachment." n29 The Senate, in turn,

shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present. n30

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n29 U.S. CONST. art. I, § 2, cl. 5.

n30 Id. at art. I, § 3, cl. 6.

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If two-thirds of the Senate vote to "convict," the only sanction is present removal and future disqualification from holding "any Office of honor, Trust, or Profit under the United States." n31 Such a person is still "liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." n32

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n31 Id. at art. I, § 3, cl. 7.

n32 Id.

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[*715] Although the President's pardoning power is broad, n33 even it cannot remove the stigma of disqualification of an impeachment. The pardoning clause specifically provides that the President is given the power to pardon "for Offenses against the Untied States, except in Cases of Impeachment." n34

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n33 E.g., *Schnick v. Reed, 419 U.S. 256 (1974); Ex parte Grossman, 267 U.S. 87 (1925); Illinois Central Railroad v. Bosworth, 133 U.S. 92 (1890); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Ex parte Garland, 71 U.S. (4 Wall.) 333, 38-81 (1867); Ex parte Wells, 59 U.S. (18 How.) 307 (1856).* See generally W. HUMBERT, THE PARDONING POWER OF THE PRESIDENT (1941).

n34 U.S. CONST. art. II, § 2, cl. 1 (emphasis added); see 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1987 292 (1937); 2 id. at 146, 171, 185, 411, 419, 575, 599, 648.

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The actual grounds for impeachment and the persons subject to impeachment are found at the end of Article II, which deals with the "executive Power." Article II provides:

The President, Vice President and all civil officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. n35

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n35 U.S. CONST. art II, § 4.

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Article III provides that no jury trial exists in cases of impeachment. The language used is interesting, for it recognizes that impeachable offenses may also be crimes:

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed. . . . n36

Whether an impeachable offense must also be an indictable crime is an issue discussed below.

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n36 Id. at art. III, § 2, cl. 3 (emphasis added).

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III. CIVIL OFFICER OF THE UNITED STATES

The Constitution limits the impeachment power to "all civil Officers of the United States." n37 Once it was decided that impeachment should not reach private citizens who have never held public office, and that punishment should not extend beyond removal from, and permanent disqualification of, holding office, [*716] this restriction was natural. n38 "Civil" excludes only

military officers, who are removable by court martial. n39 Thus, judges, as well as all legislators and all executive officials, whether in "the highest or the lowest departments" of the national government, are subject to impeachment. n40

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n37 U.S. CONST. art. II, § 4.

n38 J. STORY, supra note 24, at 284.
n39 Id. at 285-86; cf. U.S. CONST. amend. V.

n40 J. Story, supra note 24, at 285.

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The bare language in the Constitution regarding impeachment of "all civil Officers" n41 raises various questions about its scope. Should the resignation of an officer preclude either the initiation or the completion of an impeachment? Because the sanction for impeachment from federal office extends not only to present removal from office but also to future disqualification from ever holding any other office of "honor, Trust, or Profit under the United States." n42 resignation should not moot the sanction. The officer should not be able to short-circuit the impeachment inquiry by resignation, with the hope of later reentering public service, when memories have faded and evidence is stale. Congress, of course, may not wish to initiate or to complete impeachment of an officer who has resigned, but that decision is more a matter of prosecutorial discretion than a constitutional lack of jurisdiction. Although the Constitution in Article II refers to "all civil Officers," n43 that language in context means only that those who are still civil officers at the time of conviction of the impeachment must be removed. Article I does not refer to "all civil Officers" and provides only a limitation on the penalty, not a limitation on jurisdiction. n44

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n41 U.S. CONST. art. II, § 4.

n42 Id. at art. I, § 3, cl. 7.

n43 Id. at art. II, § 4.

n44 See Simpson, supra note 2, at 817 (pt. II).

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In his influential nineteenth-century treatise on constitutional law, Justice

Story said that impeachment "is strictly confined to civil officers of the United States." n45 Story also talked of "confining the impeaching power to persons holding offices." n46 If such a person is "impeached for his conduct, while in office, he [*717] could not justly complain, since he was placed in that predicament by his own choice." n47

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n45 J. STORY, supra note 24, at 283.
n46 Id. at 284.

n47 Id. (emphasis added). Story noted that if the person subject to impeachment no longer holds office, "it might be argued with some force, that [the impeachment] would be a vain exercise of authority." Id. at 289. But given the sanction of disqualification -- Story argued that "a judgement of disqualification might still be pronounced" -- the exercise would not be a vain one.

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In context, however, Story appeared to be concerned primarily with distinguishing the American practice from the contemporary British practice, which allowed impeachment of all peers and commoners. That is, for Congress to seek to impeach private citizens for engaging in offense against the federal government would be improper. America was well aware of this English practice and rejected it. In one case, Parliament had impeached a rector of a Church for the content of this sermons. n48 In another instance, Parliament impeached a private individual for "speaking lightly" of a public official. n49 The punishment in that case included being branded and also life imprisonment in the Tower of London. n50 The Constitution rejected these precedents and limited the sanction to removal from, and future disqualification of, public office. n51

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n48 3 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2013 (1907).

n49 Id. at § 2015.

n50 Id.

n51 U.S. CONST. art. I, § 3, cl. 7.

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In the United States, the historical evidence regarding jurisdiction to impeach a federal officer who resigned appears to support jurisdiction, though

the history is not without ambiguity, and what is popularly called "historical precedents" are more properly called "historical examples." The issues of jurisdiction to impeach were raised early in our history during the impeachment trial of former Senator William Blount, in 1797. Blount's lawyer argued that no jurisdiction existed, n52 because the Senate had already expelled Senator Blount for "having been guilty of a high misdemeanor, entirely inconsistent with his public trust and duty as a Senator." n53 Nonetheless, the House still impeached Blount. n54

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n52 See 8 ANNALS OF CONG. 2254, 2264, 2291 (1798).

n53 5 ANNALS OF CONG. 43-44 (1797).

n54 Id. at 440-59. Before the Senate, Blount's lawyer not only argued the jurisdictional point but also claimed that Blount had committed no high crime or misdemeanor. The Senate ultimately dismissed the charge by a vote of 14-11. 5 ANNALS OF CONG. 2319 (1799). The dismissal was ambiguous because some Senators may have believed that no impeachable offense existed even if jurisdiction existed.

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[*718] In 1876, the House unanimously impeached Secretary of War Belknap. During the Senate trial, Belknap's counsel argued that the Senate had no jurisdiction because Belknap had resigned prior to his impeachment. The Senate rejected this argument by a vote of thirty-seven to twenty-nine, n55 but then failed to convict Belknap of any of this articles; though the vote to convict on the various articles was as high as thirty-seven to twenty-nine, n56 it was still short of the two-thirds constitutional requirement. n57

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n55 19 CONG. REC. 76 (1876).

n56 Id. at 347-57.

n57 U.S. CONST. art. I, § 3, cl. 6.

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IV. SANCTIONS

The framers clearly rejected the English practice which allowed for

impeachment sanctions beyond removal and disqualification; for example, British impeachment could result in imprisonment. n58 Two places exist where the Constitution speaks directly to the issue of sanctions. Article II provides that all civil officers of the United States "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." n59 The most natural reading of this language seems to provide for a nondiscretionary sanction. If someone is impeached, he or she must be removed from office (assuming that person does not first resign).

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n58 See e.g., 3 HIND'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, supra note 48, at §§ 2013-15 (discussing British precedent).

n59 U.S. CONST. art. II, §§ 4 (emphasis added).

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In Article I, the constitution further provides that judgement in impeachment cases "shall not extend further than to removal from Office, and disqualification to hold and enjoy and [federal] Office." n60 Reading this language in conjunction with the relevant Article II clause, a Senate judgment against the civil officer apparently must lead to removal, but the Senate has discretion as to whether to impose any bar -- permanent, temporary, or no bar -- to holding any other federal office. n61

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n60 Id. at art. I, § cl. 7 (emphasis added).

n61 Story concurs in this analysis. J. STORY, supra note 24, at 289.

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[*719] V. THE STANDARD OF PROOF

The constitutional language offers little hint as to what the standard of proof should be. We know that impeachment is regarded as serious business, but also that punishment cannot include imprisonment or fine, n62 which are the usual sanctions for conviction of a crime.

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n62 U.S. Const. art. I, § 3, cl. 7.

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The seriousness and the uniqueness of impeachment caution that it should not be too readily or too easily accomplished. The standard of proof should be a high one, such as "clear and convincing evidence" -- the standard used in important, noncriminal cases. n63 That standard is thoroughly discussed in the case law and has a long pedigree in the common law. Clear and convincing evidence is typically defined as

that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal. n64

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n63 Cf. *In re Hanson, 532 P.2d 303, 308 (Alaska 1975)* (use of "clear and convincing" standard in judicial disciplinary proceedings).

n64 *Fred C. Walker Agency, Inc. v. Lucas, 211 S.E.2d 88, 92 (Va. 1975)* (quoting *Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954)*).

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The standard of proof of a preponderance of the evidence, used in ordinary civil cases, is insufficient in an impeachment action because of the seriousness of the event. Similarly, the standard used in criminal cases -- proof beyond a reasonable doubt -- is too high. That test is only used in criminal cases because the defendant may be imprisoned and may suffer loss of liberty. In the House Impeachment Committee on Richard Nixon, the staff and members of the Committee, (both those who voted for and those who voted against impeachment), agreed that the "clear and convincing evidence" standard was the correct standard. n65

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n65 J. LABOVITZ, supra note 2, at 193.

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No reason exists to believe that the standard of proof or the elements of an impeachable offense should vary depending on [*720] the person subject to impeachment. The framers obviously thought that a presidential impeachment was

particularly significant, for they provided that the Chief Justice should preside in such cases. n66 To the extent that the framers may have thought it was necessary to give the President extra protection, they provided for it explicitly by requiring the Chief Justice to preside.

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n66 U.S. CONST. art. I, § 3, cl. 6. The framers provided that the Chief Justice preside because they believed the Vice President, who normally presides over the Senate, would be subjected to an awkward conflict of interest position. See J. STORY, supra note 24, at 276.

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Sometimes it is suggested n67 that Article III judges could be impeached under a looser standard than the President or other officers because the Constitution provides that judges "shall hold their Offices during good Behavior." n68 However, a closer reading of the Constitution demonstrates otherwise. Judges, like all other civil officers, can only be removed by "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." n69 The framers were apparently contrasting the unlimited term of a federal judge ("for good Behavior") with the fixed terms for the President, the Vice President, a senator, and a representative. Both the fixed and the unfixed terms can be ended only if there is conviction for "Treason, Bribery, or other high Crimes and Misdemeanors." No evidence exists that the framers desired to compromise the independence of federal judges by making it easier to remove them. n70

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n67 See, e.g., 116 CONG. REC. 11912-14 (1970) (statement by then Congressman Gerald Ford in connection with the attempted impeachment of Justice Douglas). Ford also argued that "an impeachable offense is whatever a majority of the House of Representatives considers to be at a given moment in history." Id. at 11913.

n68 U.S. CONST. art. III, § 1.

n69 Id. at art. II, § 4.

n70 We know from the secret Convention debates that one of the delegates attacked the "good behavior" language of article III and urged that federal judges be removable by the executive simply on application of the House and Senate; Governor Morris and others strongly objected because removal by application alone would weaken the independence of the judiciary, would be applied arbitrarily, and would deprive the judges of a trial of the charges. See 1 M. FARRAND, supra note 34, at 116, 226 244, 292; 2 id. at 44, 132, 146, 172, 186, 428. The delegates then rejected any proposal to facilitate the

removal of federal judges. Id. at 428-29; see Berger, Impeachment of Judges and "Good Behavior" Tenure, *79 YALE L.J. 1475, 1511-12 (1970)*.

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[*721] VI. WHAT IS AN IMPEACHABLE OFFENSE?

The Constitution offers a brief definition of what constitutes an impeachable offense when it provides that "all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." n71 The Constitution then narrowly defines treason to "consist only in levying War against them [i.e., against the United States], or in adhering to their Enemies, giving them Aid and Comfort." n72 However, the Constitution nowhere makes any attempt at further definition.

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n71 U.S. CONST. art. II, § 4.

n72 Id. at art. III, § 3, cl. 1.

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At several points the Constitution refers to "impeachment" on the clear assumption that an impeachable offense may also be a criminal act. The constitutional language borrows from criminal law language. After the House impeaches, the Senate tries the impeachment, with a two-thirds majority of the Senators present needed before the person "shall be convicted." n73 If the person is "convicted" he or she is still liable in a criminal "Indictment, Trial, Judgment and Punishment according to [criminal] Law." n74 Article III warns us that the "trial of all Crimes, except in Cases of Impeachment, shall be by Jury." n75 Treason and bribery, specifically mentioned as constituting impeachable offense, n76 are, of course, criminal acts -- if relevant statutes so provide and the elements of the statutory offense are met. n77 Are "other high Crimes and Misdemeanors" also limited to criminal acts?

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n73 Id. at art. I, § 3, cl. 6 (emphasis added).

n74 Id. at art. I, § 3, cl. 7 (emphasis added).

n75 Id. at art. III, § 2, cl. 3 (emphasis added).

n76 Id. at art. II, § 4.

n77 See *18 U.S.C.A. § 2381* (West 1970) (treason); id. at § 201 (bribery).

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The constitutional language recognizes that some impeachable offense may be crimes, and, if they are, no requirement exists that the indictment must precede the impeachment. n78 In addition, because the sanction for impeachment is limited to removal and to disqualification, the use of impeachment does not preclude later criminal trial and punishment. n79 To say that [*722] impeachment includes treason and bribery does not limit impeachment to criminal offenses.

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n78 U.S. CONST. art I, § 3, cl. 7.

n79 Id.

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If impeachment is limited to the commission of crimes, to which law does the Constitution refer? Does it refer to federal criminal law, state criminal law, common law, or to all three? Justice Story expressed concern that if an indictable crime must be committed and if the criminal act were committed outside of the jurisdiction of the United States, then the official might escape impeachment. n80 If "other high Crimes and Misdemeanors" were only limited to crimes as defined by statute or common law, if the phrase was meant to exclude serious abuses of power and attempts to subvert the Constitution, then the phrase is quite redundant: it need only say, "other high Crimes"; there would have been no need to specify "Misdemeanors."

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n80 J. STORY, supra note 24, at 287.

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The sixth amendment provides that the trial of "all criminal prosecutions" shall be "by an impartial jury." n81 In addition, no one may be held to answer for an "infamous crime, unless on presentment or indictment of a Grand Jury." n82 If an impeachable offense must be a crime, then the prosecution of that crime should be before a jury, and if a "high crime or misdemeanor" is an infamous crime, a grand jury, not the House, must indict. Needless to say, no evidence exists to suggest that the Bill of Rights was intended to modify the

impeachment procedures already in the body of the Constitution. n83

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n81 U.S. CONST. amend. VI (emphasis added).

n82 Id. at amend. V.

n83 During the Constitutional Convention, we know that the Committee on Style initially limited impeachment to treason, bribery, or high crimes and misdemeanors "against the United States." 2 M. FARRAND, supra note 34, at 575. Later, the phrase "against the United States" was omitted. Id. at 600. We can find no evidence that this stylistic change meant that the delegates wished to incorporate by reference state criminal law.

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George Mason, one of the delegates to the Constitutional Convention, objected to limiting impeachment to treason and bribery, because he though it essential to reach "[a]ttempts to subvert the Constitution." Thus, he urged the delegates to include "maladministration." When Madison argued that such a term was too vague, Mason then substituted the phrase "high crimes and misdemeanors," a term which he told the delegates [*723] would encompass attempts to subvert the Constitution and other similarly dangerous offenses. n84 Mason explicitly and approvingly referred to the contemporary British impeachment of Warren Hastings (the Governor-General of India) as based not on treason but on an attempt to "subvert the Constitution." n85 "High misdemeanors" in British usage included "mal-administration of such high officers, as are in public trust and employment." n86 The ex-colonists were quite familiar with British usage, and, while they did not adopt all English practice, their use of the English terminology is not insignificant. n87

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n84 Id. at 550; see 1 id. at 88; 2 id. at 61, 116, 134, 145 (the executive removable only after "impeachment and conviction of mal-practice or neglect of duty."); id. at 67-69 (removal for abuse of power); id. at 172, 185-86 (removal for "treason, bribery, or corruption"); id. at 550 (removal for "maladministration" rejected as too vague a term).

n85 Id. at 550.

n86 5 W. BLACKSTONE, COMMENTARIES *121 (original emphasis omitted); see id. at *75 (defining treason as "the highest civil crime").

n87 See e.g., R. BERGER, supra note 2, at 87-90.

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The public ratification debates also support the conclusion that the phrase "other high Crimes and Misdemeanors" is not necessarily limited to "crimes" (whether defined by state or federal statute or the common law) but includes great offenses against the federal government (like treason or briery). In the state constitutional conventions, which were convened to debate the new federal Constitution, the state delegates referred to impeachable offense in such terms as "great" offenses but not necessarily criminal. n88 In these state ratifying conventions, delegates talked of how impeachment would lie if the official "deviates from his duty," n89 or if he "dare to abuse the powers vested in him by the people." n90

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n88 4 J. ELLIOTT, THE DEBATES IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 113 (1836) (James Iredell of North Carolina); see 2 id. at 538; 4 id. at 37, 44-48, 113-14 (distinguishing between crimes and impeachable offenses); see also 4 id. at 127 (Iredell stating that president is subject to impeachment for giving materially false information to the Senate with intent to obstruct the Senate).

n89 4 id. at 47 (Archibald MacLaine of South Carolina).

n90 2 id. at 169 (Samuel Stillman of Massachusetts)

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In The Federalist Papers, Hamilton advised:

> The subject [of the Senate's] jurisdiction [in an impeachment trial] are those offenses which proceed from the misconduct [*724] of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. n91

Hamilton added that it would be unwise to submit the impeachment decision to the Supreme Court because of "the nature of proceeding." The impeachment court cannot be "tied down" by strict rules, "either in the delineation of the offense by the prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate]." n92 He adds: The awful discretion which a court of impeachments must necessarily have to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons." n93

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n91 THE FEDERALIST No. 65 at 396 (A. Hamilton) (New Am. Libr. ed. 1961)

(McLean ed. 1788).

n92 Id. at 398.

n93 Id. (emphasis added).

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If the impeachment body must make not a statutory but a political judgment -- the subject of impeachment abused the powers vested in him, or subverted the constitution, or engaged in "great" offenses -- then Hamilton's references to "awful discretion" and to "political" judgments makes perfect sense. Hamilton says it is safer to have a large political body make political, discretionary judgments. The Supreme Court has no expertise in such matters, and its small number invites political intrigue.

Joseph Story adopts the Hamiltonian analysis. Story explains that "no previous statute is necessary to authorize an impeachment for any official misconduct." n94 Nor could a statute be drafted because "political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, [*725] that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it." n95

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n94 J. STORY, supra note 24, at 288. James Madison, during the first Congress, made similar statements to the effect that the President could be impeached for serious offenses which were not crimes. See 1 ANNALS OF CONG. 387 (J. Gales ed. 1834) (President may be impeached if he refuses "to check" the "excesses" of his aides, if "he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States"). The impeachment of Senator Blount (the first impeachment proceeding) elicited the view that an impeachment is "purely of a political nature. It is not so much designed to punish an offender as to secure the State." 8 ANNALS OF CONG. 2251 (1798).

n95 J. STORY, supra note 24, at 287. Other classical commentators are in agreement. See e.g., G. BOUNTWELL, THE CONSTITUTION OF THE UNITED STATES OF THE END OF THE FIRST CENTURY § 427 (1895); T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 177-78 (3d ed. 1898); J. FINNEY & J. SANDERSON, THE AMERICAN EXECUTIVE AND EXECUTIVE METHODS 59-64 (1908); R. FOSTER, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 93 (1895); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 319-21 (9th ed. 1858); J. POMERAY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 483-93 (1868); W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 209-19 (2d ed. 1829); J. TUCKER, THE CONSTITUTION OF THE UNITED STATES § 200 (1899); 2 D. WATSON, THE CONSTITUTION OF THE UNITED STATES 1027-37 (1910); 3 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, § 931 (2d ed. 1929); Brown, The Impeachment of the Federal Judiciary, *26 HARV. L. REV. 684, 704-05 (1913);* Simpson, supra note 2, at 651; Thomas, The Law of Impeachment in the United States, 2 AM. POL. SCI. L. REV. 378 (1908).

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The American experience supports the conclusion that an impeachable offense need not be a crime. Concededly, our historical practice, when the House of Representatives has decided to impeach, is not without ambiguity. In addition, impeachment trials are often highly partisan affairs; n96 the players in these dramas are not judges and often not lawyers, and historical examples are not legal precedents. Nonetheless, to the extent that such historical evidence is relevant, it shows that the House of Representatives has prosecuted various types of noncriminal conduct as impeachable offenses. n97

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n96 Historians have often condemned, for example, the partisan impeachment and trial of President Andrew Johnson. See e.g., R. BERGER, supra note 2, at 295.

n97 For example, Senator William Blount was impeached on Feb. 7, 1798, inter alia, for conducting a hostile military expedition against Spain, "contrary to the duty of his trust and station as a Senator of the United States, in violation of the obligation of neutrality, and against the laws of the United States, in violation of the obligation of neutrality, and against laws of the United States, and the peace and interests thereof." HOUSE COMM. OF THE JUDICIARY, IMPEACHMENT: SELECTED MATERIALS, H.R. DOC. No. 520-2, 93d Cong., 1st Sess. 126 (1973); see id. at 131 (impeachment of Judge John Pickering in 1803, inter alia, for appearing "on the bench of the [district] court for the administration of justice in a state of total intoxication, produced by the free and intemperate use of intoxicating liquors").

Historically, it is interesting to note that "the test of an impeachable offense in England was not an indictable, common law crime." R. BERGER, supra note 2, at 297. President Nixon, who resigned prior to a House vote, "was accused of a variety of misconduct, some criminal, some not indictable at all, which together amounted to a serious breach of his official powers." P. HOFFER & N. HALL, supra note 2, at 265

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Moreover, leaving aside historical precedent, to limit impeachment to the commission of crimes is bad policy; such a limitation is both too broad and too narrow. It is too broad [*726] because some crimes have no functional relation to the problem of malfeasance or abuse or office. For example, if an official in the executive branch, a judge, or a legislator, had been arrested once for driving while intoxicated, that crime should not merit the drastic remedy of removal from office.

The proposed limitation is also too narrow, for the "civil Officer" might engage in many activities which amount to abuse of office and yet not commit any crimes. For example, if the President abused his pardon power by

unconstitutionally pardoning a judge who had been impeached n98 or summoned the Senators from only a few states to ratify a treaty, n99 the President may have violated no criminal law, but he or she has abused the office. similarly, if a federal judge, for no good reason, refused to decide any cases, he or she has violated his or her duty under Article III. n100 Some type of wrongdoing must exist in order for an impeachment to lie n101 -- there can be no impeachment for the mere policy difference -- but federal law rejects the notion that impeachment is narrowly limited to indictable crimes.

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n98 Contra Ex parte 3 J. ELLIOTT, supra note 88, at 498-500 (corrupt presidential pardon); see *Grossman, 267 U.S. 87, 121 (1925)*.

n99 3 J. ELLIOTT, supra note 88, at 498-500 (remarks of Madison during the Virginia Convention); see 2 id. at 477; 4 id. at 124-25.

n100 In one instance Congress has provided by statute that any "justice or judge appointed under the authority of the Unites States who engages in the practice of law is guilty of a high misdemeanor." *28 U.S.C. § 454* (1948). It is interesting to note that this statute sets forth no criminal penalties. Indeed, it is not even placed in title 18, the title codifying crimes.

n101 See, e.g., *Langford v. United States, 101 U.S. (11 Otto.) 341, 343 (1879)* (president may be removed from office by impeachment if found guilty of "wrongdoing"). But see *Kilbourn v. Thompson, 103 U.S. (13 Otto.) 168, 193 (1880)* (impeachable offense involves criminality); but cf. The Legal Tender Cases (Knox v. Lee), *79 U.S. (12 Wall.) 457, 535 (1870)* (reference to impeachment as power "to punish crime"). For a discussion of the Kilbourn case, see Hacker & Rotunda, Restrictions on Agency and Congressional Subpoenas Issued for an Improper Purpose, 4 CORP. L. REV. 74, 77-81 (1981).

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Similarly, if the person subject to impeachment may have committed serious crimes before he or she assumed office, impeachment should still lie in some instances. If those crimes have a functional relationship to the present office -- e.g., it is discovered that a federal judge, who holds a position of trust, committed serious fraud or embezzlement just before accepting the position, or secured the position by bribery, or the Vice President **[*727]** was discovered to have committed treason before assuming that office -- impeachment should lie although the offense occurred before the office had been assumed. n102

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n102 Cf. Simpson, supra note 2, at 815 (pt. II):

In the state impeachments the decision seem all to be the one way. Judge

Barnard was convicted in New York of offences [sic] committed during a prior term, after a learned argument citing many precedents. So was Judge Hubbell in Wisconsin. . . . In all human probability the line never will be drawn at any other point than one where the offense is connected with the office; or is near in point of time to the acceptance of the Office. . . .

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The fact that our Constitution, for all practical purposes, leaves the definition of an impeachable offense to the House and Senate does not mean either body may exercise arbitrary power. n103 An impeachable offense need not be a violation of the criminal law, but that fact does not mean that the term "impeachable offense" has no limits. As the Texas Supreme court has noted in a case involving the state impeachment procedures:

There is a vast difference between arbitrary power and final authority. This court, in most cases, has final authority; but it has, and can exercise, no arbitrary power. So the Senate, sitting as a court of impeachment, has, and in the nature of things should have final authority; but it, too, is wholly lacking in arbitrary power. n104

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n103 See e.g., 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 634 (1935).

n104 *Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924).*

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To protect the subject of an impeachment from arbitrary use of the impeachment power, the Constitution contains certain built-in procedural safeguards. Thus, unlike the practice in Great Britain, n105 when the Untied States Senators sit as a court of impeachment, "they shall be on Oath or Affirmation." n106 A super-majority -- two-thirds of the Senators present -- must favor removal for the impeachment to be successful. n107 In the special case of a presidential impeachment the constitution provides a special, albeit limited, role for the judiciary. In that case, the Chief Justice presides, because the Vice President, who would normally preside and who would take office in the President [*728] were removed, would be in an awkward conflict of interest. n108

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n105 See J. STORY, supra note 24, at 275.

n106 U.S. CONST. art. I, § 3, cl. 6.

n107 Id.

n108 Id.; J. STORY, supra note 24, at 277.

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Though the nuances of the criminal law do not define the impeachment power, the act of impeachment is still a serious political act in which the House and Senate should participate only if the members are satisfied that the officeholder has committed serious offenses which indicate that he or she should no longer be permitted to hold office. That either the House or Senate may be able to abuse the impeachment power, as they have in the past, n109 should further caution them when they exercise it.

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n109 See, e.g., R. BERGER, supra note 2, at 295 (referring to impeachment of Andrew Johnson as an "attempt to punish the President for differing with and obstructing the policy of Congress.")_.

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VII. JUDICIAL REVIEW

Commentators have usually concluded that any impeachment proceeding, particularly a presidential impeachment, is a political question. n110 Certainly the language of the constitution supports such a view. Article I explicitly states that the House "shall have the sole Power of Impeachment," n111 and that the "Senate shall have the sole Power to try all Impeachments." n112 The most natural reading of this language appears to be a "textually demonstrable constitutional commitment of the issue to a coordinate political department." n113 The choice of this language was no accident. It reflects the explicit decision of the delegates to the Constitutional Convention to exclude any role for the courts other than providing that one judge -- the Chief Justice -- shall preside at the impeachment trail of the President. n114

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n110 See e.g., Wechsler, Toward Neutral Principles of Constitutional Law, *73 HARV. L. REV. 1-8 (1959)*. A few modern commentators have argued to the contrary. See R. BERGER, supra note 2, at 103-21; I. BRANT, supra note 2, at 183-87; Feerick, supra note 2, at 57.

n111 U.S. CONST. art. I, § 2, cl. 5 (emphasis added).

n112 Id. at art. I, § 3, cl. 6 (emphasis added).

n113 *Baker v. Carr, 369 U.S. 186, 217 (1962)*. See generally 1 R. ROTUNDA, J. NOWAK, & J. YOUNG, supra note 3, at § 2.16.

n114 An early draft proposed that the lower federal courts would have jurisdiction to impeach, and the Supreme Court to try, but this proposal was eliminated. 2 M. FARRAND, supra note 34, at 186, 499-500, 551. Similarly, the delegates rejected a proposal that the Supreme Court's original jurisdiction extend to cases of impeachment. Id. at 186, 427, 493-95.

During the North Carolina state convention debates, James Iredell discussed and supported the decision to exclude any role for the U.S. Supreme Court in an impeachment inquiry (except that the Chief Justice shall preside in a trial of the President before the Senate). 4 J. ELLIOTT, supra note 88, at 113-14. In the Pennsylvania state convention James Wilson said that the courts would have a power of judicial review to invalidate unconstitutional laws, but Wilson never suggested that such a power would extend to judicial review of impeachment trials. 2 id. at 486-94.

The framers chose to have the Chief Justice preside at the impeachment trial of the President only because the Vice President would be subject to a conflict of interest. See supra note 66 and accompanying text.

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[*729] In addition, the decision to impeach involves issues that typically are not judicially discoverable. The decision takes place only after the House decides that an impeachable offense exists. The Senate's decision to remove the public official can occur only when the Senate agrees with the House definition of impeachment. Many of these offenses, as Joseph Story noted, are "purely political" and are incapable of being defined or classified by statute. n115 The very nature of an impeachable offense demonstrates that if fails another independent and alternative test to determine when a legal question is justiciable; there are "a lack of judicially discoverable and manageable standards for resolving" the issue. n116

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n115 J. STORY, supra note 24, at 287.

n116 *Baker, 369 U.S. at 217*. For this reason, we would expect that state impeachment questions normally should be nonjusticiable, also. The grounds for impeachment under state constitutions are a matter os state, not federal law. If the state court decides that a political offense, such as gross abuse of power, is an impeachable offense, the federal courts must respect that decision. See e.g., 1 R. ROTUNDA, J. NOWAK, & J. YOUNG, supra note 3, at § 2.14.

Similarly, if a state court were to rule that an officeholder has no property

interest in his or her office, that decision normally would preclude federal procedural rights attaching to the removal from office. *Bishop v. Wood, 426 U.S. 341, 345-47 (1976)* (state law provides that state employee holds position at "will and pleasure" of city officials).

If state law does give the office some type of property entitlement, federal law must then determine what process is due. E.g., *Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)*. Yet, even in that case, the federal courts may well decide that the impeachment hearing offered by the state (e.g., hearing by state legislature) is the only process which is due, given the special, unique nature of an impeachment hearing.

Finally, in cases deciding issues of state law, we would expect the federal courts initially to "abstain" from hearing any federal constitutional claims. See *Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 27-30 (1959)* (federal abstention proper when the state proceeding is "special and peculiar," and "intimately involved with sovereign prerogative"); see also *Burford v. Sun Oil Co., 319 U.S. 315 (1943)*. See generally 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4241-48.

Although impeachment of state judges through the political process (the state legislature) may not be subject to judicial review, the removal of state judges through a judicial discipline system would be subject to complete judicial review. When the state creates a system of removal from office outside of the political system, then we should expect full judicial review.

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[*730] It is true that one can imagine cases -- particularly in the procedural context -- where there appears to be judicially discoverable standards of review. For example, what if the Senators tried an impeachment case and refused to be on an oath or affirmation, as the constitution requires? n117 On the other hand, if the country is in such a sad state that the entire Senate is willing and anxious to ignore a clear constitutional requirement, and the people do not care and are willing to let the Senate ignore the Constitution, it is probably already too late for the court to save us. One of the important effects of the constitution giving the House and the Senate the "sole power" regarding impeachments and precluding judicial review is that Congress cannot then avoid responsibility by trying to shift ultimate responsibility (or blame) to the judicial branch. Judicial review should not be an excuse to atrophy political responsibility. n118

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n117 U.S. CONST. art. I, § 3, cl. 6.

n118 Judicial review is supposed to be an ultimate safeguard, not an excuse for Congress to avoid responsibility. In 1935, President Roosevelt, by letter, urged a congressman to support a bill; the letter concluded: "I hope your committee will not permit doubts as to constitutionality, however reasonable to block suggested legislation." See R. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES

AND NOTES 11 (2d ed. 1985).

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The Federalist Papers, which recognized the need for, and defended the concept of, judicial review, n119 rejected any role for the courts in impeachment cases. n120 Justice Story, as well, noted that impeachable offense "are of a political nature," with "a very large discretion [which] must unavoidable be vested in the Court of impeachment." n121 The power of impeachment "par-takes of a political character." n122 Thus, the sole jurisdiction to impeach is in the House of Representatives, "where it should [*731] be, in the possession and power of the immediate representatives of the people." n123 The final judgment of the Senate is limited to removal and disqualification from office, sanctions which "are peculiarly fit for a political tribunal to administer, and as will secure the public against political injuries." n124 The federal courts' only jurisdiction is to hear any criminal charges which may also be brought, but in such instances the judicial sanction does not include removal or disqualification from office. n125

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n119 See THE FEDERALIST No. 78 (A. Hamilton). Fed. Paper #65 (Hamilton)

n120 See id. no. 65. "These considerations [the "awful discretion"] seem alone sufficient to authorized a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a Court of impeachments." *Id. at 398.*

n121 J. STORY, supra note 24, at 280.

n122 Id. at 273; see id. at 287 (many impeachable offenses are "purely political").

n123 Id. at 290.

n124 Id.

n125 Cf. U.S. CONST. art. I, § 3, cl. 7.

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No statute presently undertakes to provide any general definition of impeachable offenses. n126 In such a case the nature of the proceeding makes it more difficult for the court to apply andy judicial criteria for review. n127 Even is such a statute might be drafted, any such law -- to which both Houses must concur and secure the President's consent, unless both Houses override the veto -- would be unconstitutional for it might interfere with the House's sole power of impeachment. n128

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n126 Congress apparently made an effort to define an impeachable offense on a piecemeal basis in *28 U.S.C. § 454* (1948), which provides: "Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor" (emphasis added).

n127 J. STORY, supra note 24, at 278-79; *see Ritter v. United States, 84 Ct. Cl. 293 (2936)*, cert. denied, *300 U.S. 668 (1937)* (action by Judge Ritter, an impeached judge, for back-pay, dismissed because Senate has sole power in such cases).

n128 Cf. J. STORY, supra note 24, at 280-81.

Any attempt to define the offenses, or to affix to every grade of distinction its appropriate measure of punishment, would probably tend to more injustice and inconvenience, than it would correct; and perhaps would render the power at once inefficient and unwieldy.

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Judicial review of any case involving presidential impeachment is particularly ill-advised. The Chief Justice would be disqualified from sitting on any hypothetical Supreme Court review of the impeachment of the President because the Constitution commands that the Chief Justice preside at the Senate trial. n129 Moreover, the potential for national confusion would be great [*732] if the Senate were to declare the presidential office vacant and the impeached President refused to leave, applied for Supreme Court or lower court review, and raided various alleged errors -- for example, that some of the Senators who voted against him were prejudiced and should have disqualified themselves, or that the definition of impeachment was improper. Because the framers placed the sole power of impeachment in two political bodies -- the House and the Senate -- it would certainly appear that such an issue remains a political question.

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n129 U.S. CONST. art. I, § 3, cl. 6. The reason that the Constitution provides that the Chief Justice shall preside at the impeachment trial of the President is not out of any special desire to draw in the courts or to submit to judicial review. Rather, it "is to preclude the Vice President, who might be supposed to have a natural desire to succeed to the office, from being instrumental in procuring the conviction of the chief magistrate." J. STORY, supra note 24, at 276.

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CONCLUSION

Impeachment is a serious political act and an important safety valve in our Constitution. Although the courts have a very limited role to play in such a circumstance, that role is not an invitation for the national legislature to accept partisan temptations. The House and the Senate still must decide various significant questions regarding, for example, the scope and limits of impeachment jurisdiction, the standard of proof, the sanctions to be imposed, and the nature of an impeachable offense. The fact that the House and the Senate have final responsibility -- that the buck stops there, and that an appeal will lie only in history, not in the courts -- will hopefully encourage the legislators to rise above the politics of the movement.